IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 04-10070
Non-Argument Calendar

D.C. Docket No. 02-02396-CV-B-S

BENON JOHN TRAWINSKI,

Plaintiff-Appellant,

versus

UNITED TECHNOLOGIES CARRIER CORPORATION, COMFORT SYSTEMS, U.S.A.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(July 7, 2004)

Before BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

Benon John Trawinski appeals the district court's grant of summary judgment in favor of the defendants, United Technologies Carrier Corporation ("United Technologies") and Comfort Systems, USA ("Comfort Systems") as the parent

corporation of Standard Heating and Air Conditioning Co. ("Standard"), for intentional infliction of severe emotional distress ("IIED"). On appeal, Trawinski argues that the district court erred in (1) converting the defendants' motions to dismiss into motions for summary judgment without timely notifying him of its intent to convert the motions and (2) concluding that he failed to state a claim for IIED under Alabama law. We hold that, even if all of the allegations in Trawinski's complaint were true, the defendants' actions did not amount to extreme and outrageous conduct sufficient to state a claim of IIED under Alabama law. Accordingly, we AFFIRM the district court's decision to dismiss this case.

I. BACKGROUND

Trawinski, an Alabama citizen, brought this pro se civil diversity action against United Technologies and Comfort Systems asserting "intentional and reckless infliction of severe emotional distress during two full days of deposition of [Trawinski] by two attorneys for defendants," namely Robert H. Sprain and Christopher J. Zulanas. R1-1 at 1-2. Trawinski complained that, during his deposition taken on 29 September and 3 October 2000 in connection with his pro se state court action against the companies for fraud and breach of contract, these attorneys, while aware of Trawinski's poor health condition, violated Alabama Rules of Civil Procedure and Rules of Professional Conduct, questioned him with "trickery," asked him "harassing" questions, were hostile towards him, and intimidated him. Id. at 12. As a result, Trawinski alleged, he suffered "tightness on his head," general discomfort, elevated blood pressure, and double vision. Id. at 13-14. In addition, he was diagnosed as having a "Transient Ischemic Attack" on 10 October 2000. Id. at 14. Trawinski sought a total of $1,509,280.31 in monetary damages.

Trawinski subsequently amended his complaint to add a more detailed description of the deposition and to correct typographical errors. Trawinski complains that the attorneys did the following during his deposition: (1) interfered with his attempts to confer with his wife during her deposition; (2) attempted to force him "to answer questions the way [the attorneys] wanted them to be answered as reflected by Attorney Sprain's statement ... 'that's the way it's going to be'"; (3) accused him of prolonging the deposition; (4) threatened to "call [] in the Judge to intimidate [Trawinski] into answering questions he did not think he needed to answer"; (5) intentionally created and used false evidence regarding "the date of contract signing"; (6) "humiliat[ed] ... Trawinski by inappropriate body language and by giggling during his testimony"; and (7) ridiculed Trawinski for refusing to disclose the name of his treating physician by stating "[t]he doctor whose name ... Trawinski holds close to his vest and won't disclose." R1-6 at 9-15.

Comfort Systems and United Technologies moved to dismiss Trawinski's complaint pursuant to Fed. R. Civ. P. 12(b)(6) arguing, among other things, that Trawinski failed to show that the attorneys' actions amounted to "extreme and outrageous" conduct under Alabama law or that the companies could be held responsible for their attorneys' actions. In support of its motion, United Technologies submitted attorney Sprain's affidavit and a copy of the deposition at issue.

The magistrate judge entered orders setting deadlines for the parties submission of briefs and evidentiary materials concerning the motions to dismiss; there was no indication that it might convert the motions into summary judgment proceedings. After reviewing the transcript of Trawinski's deposition in its entirety, the magistrate judge recommended that the defendants' motions to dismiss be converted into motions for summary judgment and granted. The magistrate judge found that "nothing in that transcript comes even remotely near extreme and outrageous

conduct to support a claim under Alabama law," and the defendants merely were asking the questions necessary to defend their clients. R1-28 at 9-10

Trawinski objected to the magistrate judge's report arguing that the defendants' motions to dismiss were converted into motions for summary judgment without following the notice requirements of Fed. R. Civ. P. 56(c). He argued that, had he been notified, he would have submitted a complete deposition transcript, additional affidavits pointing out those particularly egregious acts by counsel and his resulting injuries, copies of his medical records, and the deposition tapes. The district court adopted the magistrate's report and recommendation over Trawinski's objections and granted summary judgment to the defendants.

II. DISCUSSION

A. Rule 56(c)'s Ten-Day Notice Requirement

Trawinski argues that the district court erred in converting the defendants' motions to dismiss into motions for summary judgment because it did not comply with the notice requirements of Rule 56(c). Under Rule 56(c), the district court must give the nonmoving party ten-days advance notice that a motion for summary judgment will be taken under advisement, and nonmovants are expressly allowed to serve opposing affidavits at any time prior to the day of the hearing. *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 (11th Cir. 1995). In addition, summary judgment cannot be entered against a party unless that party also has been given notice of his rights under Rule 56 and how he might best defend against summary judgment. *Griffith v. Wainwright*, 772 F.2d 822, 824-25 (11th Cir. 1985) (per curiam).

The record in this case indicates that the district court did not adhere to the notice requirements of Rule 56(c). However, we may nevertheless affirm the district court's judgment on any

ground. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 n.9 (11th Cir. 1998). As discussed below, even taking all of the allegations of Trawinski's amended complaint as true, Trawinski failed to state a claim for intentional infliction of emotional distress under Alabama law. Thus, it would have been proper for the district court to dismiss his complaint under Rule 12(b)(6). The district court did not need to convert the defendants' Rule 12(b)(6) motions into motions for summary judgment and did not need to comply with the notice requirements of Rule 56(c). Accordingly, the district court was correct to dismiss Trawinski's complaint for failure to state a claim of IIED.

B. Intentional Infliction of Emotional Distress

Trawinski argues that the conduct of the defendants' attorneys during his deposition amounted to IIED. Specifically, Trawinski maintains that the conduct of the "attorneys at deposition revealed their intent to do anything to prevail; it included harassment, intimidation, coercion, oppression, deliberate confusion, deceit, threats, shouting, inappropriate body language, giggling, ridicule, frenzied physical activity, and hostile menacing." Appellant's Br. at 9. He argues that this conduct was extreme and outrageous under Alabama law and caused him physical injuries.

"Whether the amended complaint sufficiently states a claim is a matter of law that we review de novo, assuming that all the allegations are true." *Kyle K. v. Chapman*, 208 F.3d 940, 942 (2000). "A complaint should not be dismissed [pursuant to Rule 12(b)(6)] for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marsh v. Butler County*, 268 F.3d 1014, 1022 (11th Cir. 2001) (en banc) (citation omitted).

To state a claim for IIED under Alabama law, the plaintiff must show that the "defendant's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be

expected to endure it." *Thomas v. BSE Indus. Contractors, Inc.*, 624 So.2d 1041, 1043 (Ala. 1993). The Alabama Supreme Court explained that "[b]y extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Id.at 1043-44 (citation omitted).

Even assuming that all of Trawinski's allegations concerning the attorneys' actions during his deposition are true, those actions do not amount to "extreme and outrageous" conduct as defined by Alabama law. The Supreme Court of Alabama has stated that IIED is "an extremely limited cause of action," *Potts v. Hayes*, 771 So.2d 462, 465 (Ala. 2000) (per curiam), and has recognized this tort "in regard to only three kinds of conduct: (1) wrongful conduct in the family burial context, (2) barbaric methods employed to coerce an insurance settlement, and (3) egregious sexual harassment." Id. (internal citations omitted). Moreover the Supreme Court of Alabama has found that "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to establish the tort of IIED. *Surrency v. Harbison*, 489 So.2d 1097, 1105-06 (Ala. 1986) (citation omitted). The behavior Trawinski complains of is not "beyond all possible bounds of decency." In fact, it is nothing more than "mere insults, indignities [and], ... annoyances," and does not rise to the level of extreme and outrageous conduct under Alabama law. As a result, Trawinski has failed to state a claim of IIED.

III. CONCLUSION

Because Trawinski fails to allege facts rising to the level of extreme and outrageous conduct under Alabama law, we affirm the district court's dismissal of his complaint alleging IIED.
AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-10070-DD

BENON JOHN TRAWINSKI,

Plaintiff-Appellant,

versus

UNITED TECHNOLOGIES CARRIER CORPORATION, COMFORT SYSTEMS, USA,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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BEFORE: BIRCH, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Benon John Trawinski is DENIED.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE
FILED AND ENTERED: 8.26.04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	02-B-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.),	)	
	)	
Defendants.	)	

ORDER

In accord with the Memorandum of Opinion entered contemporaneously herewith, it is hereby **ORDERED** that the defendants' motions to dismiss, which the court has converted to motions for summary judgment (doc. 11 & 13), are **GRANTED** and the plaintiff's claims are **DISMISSED WITH PREJUDICE.**

DONE, this 28th day of November, 2003.

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE

Entered: 12.1.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-B-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

MEMORANDUM OF OPINION

The court has considered the entire file in this action together with the Magistrate Judge's Report and Recommendation and the plaintiff's objections and has reached an independent conclusion that the Magistrate Judge's Report and Recommendation (doc. 28) is due to be adopted and approved. The court hereby adopts and approves the findings and recommendation of the magistrate judge as the findings and conclusions of the court. In accord with the recommendation, the defendants' motions to dismiss, which the court has converted to motions for summary judgment (doc. 11 & 13), are due to be granted and the plaintiff's claims are therefore due to be dismissed with prejudice. An appropriate order will be entered.

DONE, this 28th day of November, 2003.

/s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE

Entered: 12.1.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

ORDER OF REASSIGNMENT

This cause initially was assigned to the undersigned magistrate judge pursuant to the Court's General Order of Referral of Civil Matters to Magistrate Judges. The parties have not consented to the exercise of final jurisdiction by the magistrate judge under 28 U.S.C. § 636(c) and the undersigned has filed a report and recommendation concerning the complaint filed by the plaintiff. In accordance with the General Order, the case is now due to be assigned to a district judge for all further proceedings. Consequently, the Clerk is **DIRECTED** to reassign this case to the United States District Judge Sharon Lovelace Blackburn. The Clerk is **DIRECTED** to forward a copy of this Order to all counsel of record.

DONE, this the 25th day of November, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 11.25.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

ORDER

This matter is before the court on the motion of Defendant Carrier to submit its reply brief out of time. (Doc. 25). Premised on a showing of good cause, the motion is hereby **GRANTED**. [1]

DONE, this 12th day of November, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 11.12.03

[1] The court notes that the grant or denial of this motion did not impact the determination expressed in the report and recommendation filed contemporaneously herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORPORATION and COMFORT SYSTEMS U.S.A. (Owner and Parent Corp. of Standard Heating and Air Conditioning Co.), Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This case is presently pending before the court on the motions to dismiss filed by Defendants Comfort Systems, U.S.A. (hereinafter "Standard") (Doc. 11)[1] and United Technologies Carrier Corporation (hereinafter "Carrier"). (Doc. 13). For the reasons set out herein, the defendants' motions are due to be granted and the plaintiff's claims are therefore due to be dismissed with prejudice.

BACKGROUND

The plaintiff, who is proceeding, *pro se*, filed his Complaint against the defendants alleging "Breach of Duty and Invasion of Rights," and "Causal Connection Between Breach of Duty, Invasion of Rights and Injury" on October 11, 2002. (Doc. 1). Thereafter, on January 16, 2003, the plaintiff filed an Amended

[1] References to "Doc. ____" are to the documents as numbered by the clerk of the court in the court's record of the case.

Complaint (Doc. 6) and a Second Amendment to Complaint (Doc. 7) that do not appear to allege any additional causes of action, but instead "relate[s] mainly to unintentional omissions in the Complaint ... [and] add[s] specific Material Facts in further support of plaintiff's cause of action, starting with method of referring to statements on tapes recorded at the Deposition, followed by introductory section pertaining to Tone and Defendants' Manner and Aim" (Doc. 6 & 7).

Prior to the filing of this complaint, the plaintiff instituted an action in the Circuit Court of Jefferson County, Alabama (CV97-06736-WJW) and two actions in the United States District Court for the Northern District of Alabama (CV01-N-1373-S and CV01-BU-2954-S) against these same defendants.[2] In the original Jefferson County Circuit Court case, the plaintiff alleged state law causes of action based on fraud and breach of contract. However, the plaintiff voluntarily dismissed that case and later filed his complaint in this Court "ask[ing] this Honorable Court to commence an independent action, in accordance with FRCP 60(b)(6) and Rule 60(b)(6) ARCP, based on the Amended Complaint of October 1997," which was the state court action. *Trawinski v. Standard Heating & Air Conditioning Co.* (CV01-N-1373-S, Doc. 1, p. 2). In that action, the plaintiff sought review of a state court summary judgment order dismissing four counts against the defendants. This Court issued a show cause order indicating that it did not have jurisdiction to review state court decisions. (*Id.*, Doc. 2). In his response, the plaintiff attempted to raise claims under the Energy Policy and Conservation Act ("EPCA"), which the Court dismissed on the grounds that it lacked subject matter jurisdiction. (*Id.*, Doc. 4).

Thereafter, the plaintiff filed his second action in this Court alleging violations of the EPCA and an unlawful conspiracy in violation of Title 42, United States Code, Section 1985(3).

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[2]An additional defendant, Weathertech Distributing Co., Inc., was named in the other three actions, but is not a defendant in the instant case.

(CV01-BU-2954-S). The Court dismissed the plaintiff's claims because they were time-barred and because the Court lacked subject matter jurisdiction. (*Id.*. Doc. 31). The plaintiff subsequently appealed the dismissal and the Eleventh Circuit Court of Appeals affirmed.[3] *Trawinski v. United Technologies*, 313 F.3d 1295 (11th Cir. 2002).

The actions complained of in the instant case arise out of a series of the plaintiff's depositions taken by counsel for Carrier and Standard during the discovery phase of the original Circuit Court action. Upon reading his complaint, and the amendments thereto, the plaintiff's allegations appear to be as follows: (1) that the "Defendants ignored [Alabama Rule of Civil Procedure 30(e)] and did not submit the transcribed deposition to the witness for examination; plaintiff did not waive such examination and reading, and would have welcomed the opportunity if offered" (Doc. 1, p. 3); (2) that defense counsel breached its duty and invaded the plaintiff's rights by engaging in questioning that "revealed the intent of trickery and created a feeling of apprehension because of past experience with defendants' filing of false documents, and their ruthlessness in misrepresenting facts ...;" (3) that the "defense attorneys used the fact that the judge scheduled the deposition in a courtroom to intimidate plaintiff ... by trying to force plaintiff to answer questions the way they wanted them to be answered"; (4) that "throughout a day of apprehension, being exposed to trickery, questions often imprecise, confusing and/or irrelevant, some seeking privileged information, plaintiff was blamed for prolonging the deposition when it was the defendants who were responsible by their interminable protracted, harassing questions and their unfamiliarity with the RECORD." (Doc. 1, pp. 9-12). Finally, regarding damages, the plaintiff alleges that the "Defendants and their attorneys breached their duty and plaintiff's rights; they not only intentionally inflicted emotional distress, but their conduct

[3]The Eleventh Circuit noted that, although the §1985(3) claim was properly dismissed by the District Court, it was dismissed for failure to state a claim rather than want of subject matter jurisdiction.

also proximately caused physical injury ..." (Doc. 1, p. 12). Further, "Defendants by their extreme and outrageous conduct have intentionally and recklessly inflicted severe emotional distress in plaintiff, their conduct was the proximate cause of a permanent and physical injury that is expected to reduce the years of life remaining for plaintiff ... and ... there is no way ... to restore plaintiff to his pre-deposition condition." (*Id.*, p. 14). Therefore, the plaintiff seeks $750,000.00 for their actual damages (emotional distress, physical damage, reduction in life expectancy, and future expenses), $750,000.00 in punitive damages, and $9,280.31 for reimbursement to the U.S. government and to the plaintiff's insurance carrier for medical coverage provided.

In response to the plaintiff's complaint and amended complaints, Defendant Standard and Carrier each filed a Motion to Dismiss all claims against them and briefs in support thereof. (Doc. 11, 13, 14 & 16). The plaintiff filed his response, (Doc. 23) to which Carrier replied by submitting the affidavit of the court reporter responsible for transcribing the depositions in question, Paige Paugh Scott. (Doc. 25). Because briefs, deposition testimony and affidavits were presented in support of and in opposition to these motions, the court will treat the motions as motions for summary judgment pursuant to Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."). All parties have been given the opportunity to submit briefs and evidence on this matter.[4] (See Docs. 12, 15 & 23).

[4]Additional materials submitted were: (1) the plaintiff's deposition transcripts of 9/29/00 and 10/3/00 (doc. 17); (2) attachments to the plaintiff's brief in opposition to the defendants' motions to dismiss (Exhibit 1 -"Motion for Dismissal" in CV97-06736 with attached affidavit of plaintiff; Exhibit 2 - "Motion to Preserve Intact The Deposition Tapes Taken 9/29/00 and 10/3/00" in CV97-06736; Exhibit 3 - "Actions, Judgments, Case Notes" sheet form

While both defendants move for dismissal on the grounds that the plaintiff fails to state a claim for which relief can be granted, they do so for different reasons. As such, the motions will be treated separately herein.

Defendant Comfort Systems USA's Motion to Dismiss

In its motion to dismiss and brief in support thereof, defendant Comfort Systems argues that the plaintiff's complaints and amendments thereto are due to be dismissed with prejudice because the plaintiff improperly "attempt[s] to bring suit against this defendant ... as the alleged result of the conduct of Counsel that represented a subsidiary of this defendant [Standard Heating & Air] ... [for] allege[d] violations of the Alabama Rules of Professional Conduct, and the Alabama Rules of Civil Procedure, when in fact the underlying lawsuit was prosecuted in Federal Court."[5] (Doc. 11 at ¶ 2 (emphasis in original)). Additionally, Comfort Systems argues that "Plaintiff also attempts to plead a cause of action for the alleged violation of Alabama Code Sections 6-5-103 and 6-5-104(1975) based upon alleged misrepresentations ... during depositions[,] or in filings made with the Court in the prior litigations," and that the plaintiff has failed to state a cause of action upon which relief can be granted. (Doc. 11 at ¶ 4).

[4]continued - CV97-6736; Exhibit 4 - a copy of a check for $150.00 to American Court Reporting Services made out by Irene M. Trawinski; three affidavits of the plaintiff that are un-numbered; Attachment 1 - copy of the Complaint in CV97-6736; Amendment 2 - Notice of Appeal to the Alabama Supreme Court; Attachment 3 - Case Action Summary Continuation in CV97-6736; and Attachment 4 - an excerpt of the plaintiff's Eleventh Circuit Reply brief in the appeal of CV01-BU-2954-S (doc. 23); affidavit of Robert H. Sprain, Jr. (doc. 27).

[5]It appears from the record that this is inaccurate. The lawsuit underlying this action is the Circuit Court action and not one of the earlier-filed Federal Court actions.

Defendant Carrier's Motion to Dismiss

Defendant Carrier initially filed its Motion to Dismiss and Motion for Sanctions and Attorneys' Fees on February 13, 2003. (Doc. 13).[6] As grounds for its motion, Carrier asserts that the plaintiff's complaint "ostensibly alleges intentional infliction of emotional distress (the tort of outrage) ... through the conduct of legal counsel in [CV97-06736] ... [and a] further attempt to plead a cause of action for the alleged violations of Alabama Code Sections 6-5-103 and 6-5-104(1975) based upon alleged misrepresentations made by legal counsel during depositions or in filings with the court in [the circuit court action]," and that the plaintiff's complaints and the amendments thereto, fail to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 13 at ¶ 2). Further, Carrier argues that the plaintiff's allegations amount to violations of the Alabama Rules of Professional Conduct, which do not independently serve as a legal basis for a private cause of action. (Id., at ¶ 4). Lastly, Carrier argues that this case is due to be dismissed because Carrier owed no duty to the plaintiff "under tort law with respect to activities during discovery of a litigated case brought by the plaintiff." (Id. At ¶ 4).[7]

Plaintiff's Response to Defendants' Briefs

The plaintiff submitted one brief in response to the defendants' briefs wherein he clarifies that the only cause of action he is asserting is "intentional and reckless infliction of severe emotional distress during two full days of deposition," as well as any other torts the court wishes to derive from the plaintiff's "averments." (Doc. 23 at ¶ 1). The plaintiff expressly makes "no attempt to plead for fraud" and any reference to allegedly fraudulent statements made by defense counsel was for the

[6]However, on March 4, 2003, Carrier voluntarily withdrew its motion for sanctions and attorneys' fees (Doc. 20).

[7]This is the second paragraph four on page 3.

purpose of establishing that such "deceitful statements at deposition are inflicting, intentionally, severe emotional distress on plaintiff."[8] (Doc. 23 at ¶ 2). The remaining fourteen pages of the plaintiff's brief cites law regarding breach of duty and the defendants' "misconception" thereof, menacing, reckless endangerment, agency, and civil and criminal liability for tortious conduct. The plaintiff even attempts to show how the defendants "exhibited their culpable mental state ... by willful and oppressive conduct involving abuse of authority, shouting, threatening statements, and using body language and giggling to humiliate plaintiff." (Doc. 23, p. 8-9). However, as stated previously, the plaintiff makes no attempt to establish any additional causes of action. As such, the court need only address the outrage claim.

SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265(1986). The party asking for summary judgment "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the nonmoving party to demonstrate

[8]Likewise, the plaintiff makes similar statements regarding his claims based upon the Alabama Rules of Professional Conduct. For example, the plaintiff states that "'the object of the present action is the conduct of defendants through their attorneys at the year 2000 depositions'[sic] and reveals reason supporting the facts of the present action by introducing evidence of past conduct ... indicating that defendants are conscious wrongdoers. It follows that any plaintiff's reference ... regarding defendants' conduct outside the two days of deposition, is an affirmative assertion and evidence that these defendants are conscious wrongdoers, that is, their acts are either intolerable in a civilized society, or are in violation of procedural or substantive law, all used to benefit themselves and to the detriment of plaintiff." (Doc. 23, p. 3-4).

that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of her case on which she bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23; see Fed.R.Civ.P. 56(a) and (b). Once the moving party has met her burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial; however, the movant may not merely rest on the pleadings. (Id.).

After a motion has been responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

Intentional Infliction of Emotional Distress/Outrage

The plaintiff's assertions amount to a claim of intentional infliction of emotional distress. In Alabama, "the torts of outrage and intentional infliction of emotional distress are one and the same." *Wiggins v. Risk Enterprise Mgmt. Ltd.*, 14 F.Supp.2d

1279, 1283, n.2 (M.D. Ala. 1998) (citing *Stewart v. Matthews Indus., Inc.*, 644 So.2d 915, 918 (Ala. 1994)). To establish a cause of action for outrage, the plaintiff must show that the defendants' conduct: "(1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it." *Thomas v. Industrial Contractors, Inc.*, 624 So.2d 1041, 1043 (Ala. 1993) (citing *American Road Service Co. v. Inmon*, 394 So.2d 361, 365 (Ala. 1980)). The Alabama Supreme Court elaborated that, "[b]y extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and intolerable in a civilized society." *Inmon*, 394 So.2d at 365 (citing Comment (d) Restatement (Second) of Torts § 46 (1948)). In Alabama, outrage claims have only gone to a jury in three types of cases: (1) cases involving wrongful conduct in the burial of a family member; (2) cases involving "heavy-handed" and "barbaric" measures by an insurance agent in an attempt to settle an insurance claim; and (3) cases involving egregious sexual harassment. *Thomas*, 624 So.2d at 1044.

The conduct in question in the instant case arises out of conduct occurring during two days in which counsel for the defendants took the plaintiff's deposition for the original Circuit Court action. The Court has read the transcript of that deposition **in its entirety**. The court finds that nothing in that transcript comes even remotely near extreme and outrageous conduct to support a claim under Alabama law. (See *National Security Fire & Casualty Co. v. Bowen*, 447 So.2d 133 (Ala. 1983) (finding insurance agency's conduct in handling the plaintiff's claim to be extreme and outrageous where agents handling the claim threatened witnesses, attempted to bribe witnesses, threatened to kill the plaintiff's children or cut off their arms, and threatened to kill the plaintiff, among other things, in an attempt to get him to settle his claim). To the contrary, the court finds that the defense counsel asked questions necessary to defend the plaintiff's claims of fraud and breach of contract. Defendant counsel's conduct in asking those

questions, although uncomfortable for the plaintiff, was far from outrageous and extreme. (See *Surrency v. Harbison*, 489 So.2d 1097 (Ala. 1986) (finding insufficient evidence to establish the tort of outrage where plaintiff's employer cursed, bumped, shoved, pushed, and otherwise assaulted the plaintiff) and *Newton v. Town of Columbia*, 695 So.2d 1213 (Ala. Civ. App. 1997) (finding that an off-duty police officer's assault of the plaintiff that might have resulted in a deprivation of her constitutional rights was insufficient as a matter of law to rise to the "stringent standard of outrageous and extreme conduct adopted by our supreme court.")).

Furthermore, the plaintiff's refusal to answer routine and discoverable questions, such as the name of his treating physician when he is asserting claims for mental anguish and physical injury, is not only counter to the progression of his lawsuit, but is also in contravention of the state and federal discovery rules. The plaintiff must remember that it was he who brought the initial lawsuit and the defendants had a right to defend the claims brought against them. That is not to say that a defendant can use extreme and outrageous conduct to extrapolate information from a plaintiff; rather, the Rules of Civil Procedure proscribe the ways in which parties may attain information. However, the Court finds that, in this instance, the defendants acted within the parameters of those rules. [9]

While the plaintiff subjectively may feel that the line of questioning was invasive, the defendants were entitled to the information sought. The deposition is a fact-finding tool. A lawsuit is not a game of "hide the ball." While a deposition is not a "fishing expedition," the party taking the deposition is entitled

[9] It is clear from the deposition transcripts that Judge Vowell ordered the parties to conduct the plaintiff's deposition in his jury room; presumably so that he could oversee the deposition and be available should the plaintiff, who was proceeding *pro se*, have any questions or concerns.

to discoverable information consistent with the applicable rules of procedure.

Discovery in State Circuit Court is governed by the Alabama Rules of Civil Procedure, which "permit very broad discovery and the rules must be interpreted broadly and liberally construed." *Cole v. Cole Tomato Sales, Inc.*, 310 So.2d 210 (Ala. 1975). At the same time, "the right of discovery is not unlimited and ... the court [has] broad power to control the use of the process and to prevent its abuse by any party." *Ex parte Alabama Power Co.*, 196 So.2d 702 (Ala. 1967). The Alabama Supreme Court has stated that the discovery rules "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Ex parte Dorsey Trailers, Inc.*, 397 So.2d 98 (Ala. 1981) (citing *United States v. Procter and Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Further, "a defendant is entitled to determine the factual basis of the plaintiff's claim and all facts going to prove or disprove defendant's defense. *Ex parte Dorsey*, 397 So.2d at 104 (citing 4 Moore's Federal Practice, P 26.57).

Because the plaintiff is proceeding *pro se*, the court recognizes that he is not charged with knowledge of all the rules. However, as stated previously, after reading the deposition transcript in its entirety, the court does not find that counsel for the defendants acted inappropriately in any way. If they had, the plaintiff's proper forum for objecting to their behavior would have been the State Circuit Court. ALABAMA RULE OF CIVIL PROCEDURE 30(d)(4) provides that:

> At any time during the taking of the deposition, on motion of a party or of the deponent and upon showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is

pending or the circuit court where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition ...

Ala. R. Civ. P. 30(d)(4). As such, if the plaintiff thought that defense counsel was acting unreasonably, his objection would have been properly lodged with the Circuit Court at or about the time of the deposition. This Court is not the proper forum for such an objection.

In the instant action, the plaintiff's objections to defense counsel's questioning are couched as a claim for the tort of outrage. While at times during the deposition, defense counsel acted irritated and frustrated at the plaintiff's reluctance and/or refusal to answer questions, irritation and frustration alone do not being to rise to the level of conduct necessary for a tort of outrage claim. The alleged conduct by counsel simply is insufficient as a matter of law to state a claim upon which relief can be granted by this Court.

CONCLUSION

Premised on the foregoing, the defendants' motions to dismiss, which the court has converted to motions for summary judgment, are due to be granted.

Any objections to this report and recommendation must be filed within ten days of the date it is entered by the Clerk of Court and in accordance with Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1).

DONE, this 12th day of November, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 11.12.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
-SOUTHERN DIVISION-

Benon John Trawinski,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	**CIVIL ACTION NO.:**
	*	**CV02-JEO-2396-S**
United Technologies Carrier	*	
Corp. and Comfort Systems,	*	
USA (Owner and parent corp.	*	
of Standard Heating & Air	*	
Conditioning Co.),	*	
	*	
Defendants.	*	

MOTION TO DISMISS AND MOTION FOR SANCTIONS AND ATTORNEYS' FEES

WITHDRAWN as to the motion for sanctions and attorney's fees only.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 3.4.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
COMFORT SYSTEMS , USA,	)	
et al.,	)	
	)	
Defendants.	)	

ORDER

On February 6, 2003, Defendant Comfort Systems, USA, filed a "Motion to Dismiss." (Doc. 11). Any evidentiary material and brief that the defendant intends to file in support of the motion must be filed by **February 21, 2003**. Any evidentiary material and brief that the plaintiff intends to file in opposition to the motion must be filed by **March 7, 2003.** Any reply brief by the movant must be filed by **March 21, 2003**. A hearing on the motion, if deemed necessary, will be set by separate order.

The Clerk is directed to serve a copy of this order upon counsel for the parties.

DONE this 6th day of February, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 2.7.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
COMFORT SYSTEMS , USA,	)	
et al.,	)	
	)	
Defendants.	)	

ORDER

On February 13, 2003, Defendant United Technologies Carrier Corporation filed a "Motion to Dismiss and Motion for Sanctions and Attorney's Fees." (Doc. 13). Any evidentiary material and brief that the plaintiff intends to file in opposition to the motion must be filed by **March 7, 2003**. Any reply brief by the movant must be filed by **March 21, 2003**. A hearing on the motion, if deemed necessary, will be set by separate order.

The Clerk is directed to serve a copy of this order upon counsel for the parties.

DONE, THIS 19TH day of February, 2003.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 2.20.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
UNITED TECHNOLOGIES CARRIER CORP. and COMFORT SYSTEMS, USA. (Owner and Parent Corp. of Standard Heating & Air Conditioning Co.),	)	
	)	
Defendants.	)	

ORDER

The plaintiff, Benon John Trawinski, has filed a "Motion for Confirmation," requesting that the court "confirm" that he has 120 days from the date of the filing of the complaint in this action to prefect service. Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 4(m), the plaintiff has 120 days from the filing date to serve the defendants.

The Clerk is **DIRECTED** to serve a copy of this order on the plaintiff.

DONE, this the 24th day of December, 2002.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 12.27.02

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BENON JOHN TRAWINSKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	02-JEO-2396-S
UNITED TECHNOLOGIES	)	
CARRIER CORP. and	)	
COMFORT SYSTEMS, USA.	)	
(Owner and Parent Corp. of	)	
Standard Heating & Air	)	
Conditioning Co.),	)	
	)	
Defendants.	)	

ORDER

The plaintiff, Benon John Trawinski, has filed a *pro se* complaint, alleging what appears to be claims of invasion of privacy and outrage. (Doc. 1). The plaintiff paid the requisite filing fee but did not provide the Clerk of Court with the necessary items to perfect service of process on the defendants. Additionally, nothing in the file indicates that the defendants have been served with process in any manner consisted with FEDERAL RULE OF CIVIL PROCEDURE 4.

The plaintiff is hereby **ORDERED** to inform this court of his intentions regarding service within eleven (11) days of the date of this order. A failure to respond to this order will result in dismissal of this action. If the plaintiff elects to have the Clerk of this Court perfect service of process on the defendants by certified mail, the plaintiff must provide the Clerk with copies of the complaint, prepared summonses, and pre-paid envelopes made

returnable to the Clerk of the Court within eleven (11) days of the date of this order.

The Clerk is **DIRECTED** to serve a copy of this order on the plaintiff.

DONE, this the 2nd day of October, 2002.

/s/ John E. Ott
JOHN E. OTT
United States Magistrate Judge

Entered: 10.3.02